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The Moral Rights Act of 2007: Finding the Melody in the Music

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THE MORAL RIGHTS ACT OF 2007: FINDING THE MELODY IN THE MUSIC

AURELE DANOFF*

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I. INTRODUCTION

The history of piracy is nothing new. The term itself traces back to 500 B.C. and the ancient worlds of Greece and Rome, when pirates attacked and looted ships sailing the Mediterranean. In music, piracy roots itself in the 1920s, when radio stations played music without compensating artists, despite it being "close to

* J.D., Pepperdine University School of Law, May 2007; B.A., Columbia University, *cum laude*, May 2002. This Article was written while enrolled in the course "Special Problems in the Music Industry," taught with expertise by Professor Marc Goodman at Pepperdine University School of Law in the Spring of 2006. The author would like to thank her mother, a recognized voice of Israel, for inspiring this writing; her brother, an aspiring musician and profound writer, who's editing skills helped this Article materialize; and her father, her role model in academia, who initially mocked the notion of "moral rights" in the music industry, yet ultimately found the product absolutely necessary for future generation's continued appreciation of one language we all understand—music.

impossible” to copy vinyl records.¹ During the 1960s, with the advent of the blank tape, the public began dubbing mixed tapes and recording live concerts.² Fast-forward to 2007 and the prevalence of online piracy, where a relatively young phenomenon presents a unique challenge to the music industry and recording artists.

The increased challenge for protecting copyrights in the music industry is due in large part to the new technology available to the public. File-sharing and peer-to-peer networks are too fast, easy and convenient for the industry to come up with effective modes of control and regulation.³ Despite copyright infringement issues, artists’ *moral* interests are also severely jeopardized, since an artist’s work is so readily available to the public and “vulnerable to disregard, infringement and abuse.”⁴ In an era when technology—uploading, downloading, burning, streaming, copying, file-sharing, hard-drive swapping—is developing at a faster rate than the laws regulating it, or which the record companies, publishing houses or lobbyists can control, the exigency for *moral rights* development in copyright law must be recognized as a legal priority for the music industry.⁵

The goal of American Copyright Law embodied in Article I, Section 8, Clause 8 of the United States Constitution, reads in pertinent part, “Congress shall have Power. . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶ The current focus of this constitutional principle is based on an economic paradigm and does not address the significance of moral issues pertaining to musical artists. Although U.S. copyright legislation *does* grant a limited version of moral rights to “visual” artists,⁷ there are no such rights afforded to musical artists, or any works that fall outside the definition “work of visual art.”⁸

¹ Darcie-Nicole Wicknick, *The RIAA Music Downloading Controversy: Both Sides of the Record*, http://www.musicbizadvice.com/a_little_history_on_music_piracy%20.htm (last visited Feb. 27, 2007) [hereinafter Wicknick].

² Wicknick, *supra* note 1. Piracy exists in four basic categories: first, pirate recordings (unauthorized distribution of the sound without packaging, *i.e.* no liner notes); second, counterfeit recordings (unauthorized recordings of the sound and packaging); third, bootleg recordings (unauthorized recording of live concerts, radio or television broadcast); and fourth, online piracy (unauthorized uploading or downloading of copyrighted material). RIAA, *Anti-Piracy*, (2003) <http://www.riaa.com/issues/piracy/default.asp> [hereinafter *Anti-Piracy*].

³ It is estimated that “[a]t any given moment, five million Americans are participating in file-sharing, making for a total of 2.6 billion downloads each month.” Stacey M. Lantagne, Note, *The Morality of MP3s: The Failure of the Recording Industry’s Plan of Attack*, 18 HARV. J.L. & TECH. 269, 273 (2004) [hereinafter Lantagne]. Each year, the industry is estimated to lose \$4.2 billion to piracy worldwide. *Anti-Piracy*, *supra* note 2.

⁴ Mira T. Sundara Rajan, *Moral Rights and Copyright Harmonisation: Prospects for an ‘International Moral Right’?*, 17TH BILETA ANNUAL CONFERENCE 2-3 (2002), <http://www.bileta.ac.uk/pages/conference%20papers.aspx> (follow “Moral Rights and Copyright Harmonisation-Prospects for an ‘International Moral Right’” Hyperlink) [hereinafter Sundara Rajan].

⁵ *Id.*

⁶ U.S. Const. art. I, § 8, cl. 1, 8.

⁷ See 17 U.S.C. *et seq.* (2006) (commonly referred to as the Visual Artists Rights Act of 1990).

⁸ Rajan Desai, *Music Licensing, Performance Right Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL.

The grant of moral rights would entitle a musical artist to the protection of every aspect of each creation, including the protection and respect for the artist's moral intentions and creative content. I hope to prove that by exercising the implication of moral rights, as they pertain to musical copyright, we will generate a new and significant perspective in the ongoing discussion of copyright law. Ultimately, this will empower us to build a more thorough defensive argument in the struggle for protecting the "exclusive Right" of "Authors," as delineated by the U.S. Constitution.⁹ My goal with this Article is to create a new paradigm in which the public, recording companies, publishing houses, and licensing companies approach a work of authorship.

Moral rights (also commonly referred to as *droit moral*) developed from the theory that an artist "expresses his or her *personality* and *individual* traits in a work and one cannot separate the artist from the work."¹⁰ Moral rights are based on "a belief that artistic creation is something more than an attempt to earn a livelihood. The creative act results in a *special relationship* between the creator and his work."¹¹ While copyright is a property right, moral rights are considered a *human* right.

There are at least four types of recognized moral rights:

(1) attribution: the right to be given credit and to claim credit for a work, and to deny credit if the work is changed; (2) integrity: the right to ensure that the work is not changed without the artist's consent; (3) publication: the right not to reveal a work before its creator is satisfied with it; and (4) retraction: the right to renounce a work and withdraw it from sale or display.¹²

These rights are independent of and different from traditional copyrights. As opposed to the economic, material and physical nature of current copyright law, moral rights do not emphasize economics, but rather the more philosophical and less alienable nature of artistic creativity (though the exercise of them may have economic consequences, which would not differ from remedies available under existing copyright law).¹³ For this reason, developing moral rights in United States copyright law is a challenge—it requires a new understanding by Congress, the recording industry, the public, and artists about what it means to be a creator.¹⁴ If

PROP. L.J. 1, 17 (2001) [hereinafter Desai].

⁹ See U.S. CONST. art. I, § 8, cl. 1, 8.

¹⁰ Desai, *supra* note 8, at 11 (emphasis added) (citation omitted). See generally Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM. J.L. & ARTS 361 (1998) (discussing the historical development of the idea to protect artistic creation in continental Europe) [hereinafter Swack].

¹¹ Sundara Rajan, *supra* note 4, at 4 (emphasis added).

¹² BLACK'S LAW DICTIONARY 1030 (8th ed. 2004). There is also *droit de suite*, also known as the artist resale right, which is closely connected to the concept of moral rights. *Id.* at 534.

¹³ Patrick G. Zabatta, *Moral Rights and Musical Works: Are Composers Getting Burned?* 43 SYRACUSE L. REV. 1095, 1096-97 (1992) [hereinafter Zabatta].

¹⁴ Principally, five groups stand to lose from piracy: (1) music pirates, because the recording industry and law enforcement officials are beginning to crack down on the problem; (2) consumers, because illegal copying produces inferior quality tracks and furthermore drives up costs of CDs to compensate for lost sales; (3) honest retailers, because market prices cannot compete with prices of cheap illegal copies; (4) record companies, because eighty-five percent of records released never recoup

all these parties can come to understand what moral rights legislation really *means*, and not how much money it generates, then it could be possible to conquer piracy with a new additional moral element to the United States Copyright Act.¹⁵

It must be emphasized that the value of a work of authorship is more than its mere financial worth.¹⁶ Moral rights benefit artists who view their creation as something more than a livelihood, and who would be satisfied with an injunction in lieu of monetary compensation to ensure the integrity of a work of authorship.¹⁷ But, when, and if moral rights are recognized, there will be a definite economic impact on recording contracts, licensing agreements, and reproductions, to name a few products of the music industry.¹⁸ Those who are concerned with the adverse economic effects of moral rights legislation should understand that this legislation will only impact economic rights in a limited way.

I admit, moral rights may not be the ultimate solution for the impact of illegal downloading, but there must, at the very least, be a proposal to expand the limited reach of economic rights, which by themselves are not protecting the music industry from its potential demise. Even though the public finds the bounty of piracy to be cheap and easy, the bottom line is that it is *illegal*. Moral rights offer a new approach to fight piracy. Whether or not it is a stronger remedy has yet to be seen. If as a society we intend to protect both the economic value of a work of art, as well as the value of the creator's moral intentions, then we must recognize the importance of moral rights legislation.

This Article seeks to implement a moral rights clause in the United States Copyright Act applicable to the legitimate interests of musicians and complementary to existing economic principles. Part II discusses the historical framework of moral rights legislation, its prevalence in Europe, and its establishment in the United States under the Visual Artists Rights Act of 1990 ("VARA") of the Copyright Act.¹⁹ Part III discusses the current state of affairs, America's reluctance to moral rights in lieu of other legislative remedies, as well as the musician's inferior relationship to recording and licensing companies. This section also addresses why economic-based litigation and legislation are not the most productive models to combat music piracy.²⁰ Part IV tackles the deficiencies in the current U.S. Copyright Act, and sets forth draft language for "The Moral Rights Act of 2007."²¹ Part V entertains potential opposition to this Bill, including recording companies, publishing houses, illegal file-sharers and digital sampling or mashing artists, and focuses on why this opposition should not prevail.²² Part VI

costs, and consequently, the companies' reduced income cannot support the development of new artists and the expansion of the music business in general; and finally (5) artists, because they lose royalties and the respect they ultimately deserve. Anti-Piracy, *supra* note 2.

¹⁵ See 17 U.S.C. § 101 (2006).

¹⁶ See Swack, *supra* note 10, at 361-62.

¹⁷ *Id.*

¹⁸ See generally Desai, *supra* note 8 (discussing the music licensing scheme in the United States).

¹⁹ See *infra* notes 24-35 and accompanying text.

²⁰ See *infra* notes 36-115 and accompanying text.

²¹ See *infra* notes 116-156 and accompanying text.

²² See *infra* notes 157-170 and accompanying text.

concludes the Article, supporting my belief that the proposed legislation should pass constitutional muster, as a logical extension of VARA under the Copyright Act, and because it promotes constitutional principles, namely the “Progress” of “useful Arts” and the “exclusive Right” of “Authors” “Writings.”²³

II. THE HISTORY OF MORAL RIGHTS IN THE UNITED STATES

Moral rights emerged in Europe in the nineteenth century, following centuries of musical, literary, and artistic creativity.²⁴ Moral rights developed initially in France and spread to continental Europe to protect an artist’s personal right in the overall integrity of his or her work and to protect Europe’s cultural property.²⁵ On the other hand, the United States, “[b]usy with the economic exploitation” and development of its own country, “perhaps, neglected the arts,”²⁶ resulting in little moral rights legislation. However, if we turn the clock forward to the present day, we find that the United States has now developed an expansive artistic legacy of its own. Thus, to protect the interests of American citizens, the need for legitimate and legal defense of moral rights exists now more than ever.

The European system, via the Berne Convention for the Protection of Literary and Artistic Works, played an important role for the development of moral rights in the United States.²⁷ The Berne Convention Treaty sought to harmonize moral and economic rights, so that both rights would coexist when a work of authorship materialized.²⁸ Principally, the United States motivated to join the

²³ See *infra* notes 171-173 and accompanying text.

²⁴ Swack, *supra* note 10, at 363 (citations omitted). “Throughout time, European cities, ‘from the classical Greek period in Athens, the neo-classical in Rome, the medieval and gothic art in various continental cities, the high Renaissance in Florence, and the late nineteenth-century impressionism in Paris,’ have housed the major centers of art.” *Id.*

²⁵ *Id.* at 363-64. “French revolutionary laws were similarly concerned with vesting control of intellectual works with their creators, combined with the desire to foster the dissemination of knowledge and the protection of economic interests. As with the Venetian privilege, French revolutionary laws gave creators control over their works by requiring printers to obtain ‘formal written permission’ from authors. This put creators in a better position not only to secure economic benefits but also to limit distortion of their work.” Thierry Joffrain, Comment, *Deriving a (Moral) Right for Creators*, 36 TEX. INT’L L.J. 735, 748 (2001) [hereinafter Joffrain]. Some form of moral rights also exists in Asia, South America, Africa, Europe, and Canada. Desai, *supra* note 8, at 12.

²⁶ Swack, *supra* note 10, at 364.

²⁷ Desai, *supra* note 8, at 13.

²⁸ See Paris Act of the Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter *Berne Convention*]. Although this is beyond the scope of this paper, “efforts to harmoni[z]e protection [on an international level] have been consistently unsuccessful.” Rajan, *supra* note 4, at 2. However, “[t]he solid presence of moral rights on the international copyright scene [discussions including how to incorporate Berne into The Agreement on Trade-Related Aspects of Intellectual Property/World Trade Organization (TRIPS/WTO) system, the World Intellectual Property Organization (WIPO), and the Copyright Harmonization Directives of the European Union] suggests a degree of international consensus that moral rights should be protected.” *Id.* at 4. Furthermore, music piracy is an international phenomenon, such that the inclusion of moral rights legislation in the United States would have a positive impact on the international world via Berne principles.

Berne Convention because each Berne signatory enjoyed the copyright protections of all other signatory nations.²⁹

The United States joined the Berne Convention in 1988, and in doing so, the Berne Convention Implementation Act imposed changes to United States copyright law.³⁰ Article 6bis of the international treaty of the Berne Convention granted authors the *moral rights* of attribution and integrity, and the U.S. thereby needed to comply with this requirement.³¹ However, the United States only exercised *minimal* compliance with Article 6bis of the Berne Convention “by finding that a few copyright provisions, unfair competition law, state statutes, and some common law remedies provided enough moral rights protection to meet the demands of the Berne Convention.”³²

In 1990, the United States implemented VARA, which was the first federal legislation to conclusively grant the moral rights of attribution and integrity to works of visual art.³³ In Europe, there are also the moral rights of divulgation and retraction, two rights the United States has yet to consider in any legislation.³⁴ The irony is that Congress must have thought moral rights important, because why else would Congress allege in 1988 that the United States complied with Berne requirements, and two years later, implement VARA? Unfortunately, despite only offering two of the four recognized moral rights, VARA further offers no protection for musical works, because they do not fall within the definition of “visual art.”³⁵

I will now explore how Congress’ deference to state statutes, common law opinions, and economic legislation does not address the need for moral rights and the challenges that arise without them.

²⁹ Joffrain, *supra* note 25, at 750.

³⁰ Desai, *supra* note 8, at 13-14. The World Intellectual Property Organization (WIPO) administers the Berne Convention. Although there is no “international copyright,” most countries have agreed to the basic tenets of: (1) the right to authorize reproduction of an artist’s work; (2) the right to authorize translation of the work; (3) the right to authorize public performance of the work; and (4) the right to authorize adaptations or alternations to the work. See RIAA, Copyright Laws available at <http://www.riaa.com/issues/copyright/laws.asp> (last visited Apr. 11, 2006) [hereinafter Copyright Laws].

³¹ Desai, *supra* note 8, at 13 (citation omitted).

³² *Id.* at 14. (citations omitted). See also H.R. Rep. No. 100-609, at 33-34 (1988). See *infra* notes 36-115 (discussing the deficiencies with current copyright provisions, unfair competition law, state statutes, and common law remedies).

³³ 17 U.S.C. § 106(A) (1994).

³⁴ Desai, *supra* note 8, at 12-13.

³⁵ 17 U.S.C. § 106 (1994).

III. CURRENT STATE OF AFFAIRS

A. *United States' Reliance on Existing Legislation for Moral Rights Protection*

Eleven states have passed some form of moral rights protection for artists, including California, Maine, New York, New Jersey, Massachusetts, Pennsylvania, and Louisiana.³⁶ However, none of this legislation includes musician's rights because the definition is limited to fine arts. For now, a musician cannot look to state statutes, but can only rely on moral rights protection under state contract law, unfair competition laws, privacy torts or defamation law.³⁷ In terms of federal law, the remedies are also limited to a case-by-case analysis, without sufficient redress for an artist's intent. Such protections do not address the specific goals of moral rights legislation and are limited to the remedies provided therein.

First, a breach of contract remedy is limited to the contractual provisions within the contract, and the terms must be agreed on by all parties. In *Vargas v. Esquire Magazine, Inc.*,³⁸ illustrator Vargas signed a contract with Esquire Magazine to publish his drawings of women, which he named "the Varga Girl."³⁹ After six years, Esquire cancelled the contract, but proceeded to publish three drawings under the title, "the Esquire Girl." Vargas sued to enjoin the further publication of his work, but the Court held that the contract had "divested [Vargas] of all title, claim and interest in such drawings and designs."⁴⁰ Although not specifically mentioned in the case, this is also an example of the "work-for-hire" doctrine, which basically exists when a person creates a copyrightable work but does not own the copyright in it.⁴¹ Thus, the Court allowed Esquire Magazine to falsely publish Vargas' work against his personal interests at stake, a remedy otherwise available by the moral rights of integrity and attribution.

Second, under state unfair competition remedies, a case will only be actionable where the proven deception convinces the public to buy the falsely attributed product.⁴² A person may be enjoined from putting an artist's name on a product falsely attributed to him or her and in competition with the artist's own product. But, what would happen if a digital sampling or mashing musical artist uses a sample (albeit licensed) in a manner that diminishes the original creator's artistic vision and exploits such in a different market?⁴³

³⁶ Desai, *supra* note 8, at 16.

³⁷ *Id.*

³⁸ Swack, *supra* note 10, at 385 (citing *Vargas v. Esquire Magazine, Inc.*, 164 F.2d 522 (7th Cir. 1947)).

³⁹ *Id.*

⁴⁰ *Id.* at 384-385.

⁴¹ The problem is, in a work-for-hire, the remedy is even more tenuous because the artist is not considered the creator in the eyes of the law—the employer is considered the original author. See *infra* notes 87-89 and accompanying text.

⁴² Swack, *supra* note 10, at 384.

⁴³ See *infra* notes 66-76 and accompanying text.

Under federal law, particularly the Lanham Act,⁴⁴ some courts will protect the artist's moral rights even in the absence of clear federal law. For example, in *Gilliam v. American Broadcasting Companies, Inc.*, the Court found that the truncated broadcast by ABC of the Monty Python comedy group violated the integrity of Python's work.⁴⁵ Despite this holding, the Court conversely could have considered ABC's use a "fair use" as criticism or review, a point which will be discussed more thoroughly below.⁴⁶ Thus, most courts believe the connection between the Lanham Act and its ability to protect moral rights is tenuous.⁴⁷ Though it is clear that some courts would like to recognize moral rights, it is difficult for courts to substantiate moral rights in the absence of definitive legislation and supportive case law.

Third, although existing defamation and privacy laws are similar to the integrity moral right, defamation does not cover the work itself, but rather the harm to an author's character or name *alone*.⁴⁸ In *Giesel v. Poynter Products, Inc.*, the illustrator and writer Theodore Geisel, writing under the pseudonym of Dr. Seuss, brought an action against Poynter for selling dolls based on his drawings.⁴⁹ Although Geisel believed that the dolls were of such poor quality that they defamed his reputation, the court held that since Poynter exercised "great care, skill, and judgment" in creating the doll, there was no injury to Geisel's professional reputation.⁵⁰ If moral rights existed, Giesel would have a claim for infringement of the attribution moral right.

Under privacy laws, one could obtain protection if his or her name were misappropriated, essentially because an economic interest is at stake; however, the impact would be more effective if a moral rights aspect is emphasized as well. For example, Tom Waits, whose distinctive singing style is often imitated in a number of commercials, claims, "I have a moral right to my voice. It's like property."⁵¹ A Spanish court recently confirmed, finding Audi's use of Waits' voice in an automobile commercial to be more than a property interest, awarding Waits both \$43,000 for copyright infringement and an additional \$36,000 for moral rights violation.⁵² Although Tom Waits won via privacy laws, he himself emphasizes that moral rights are equally as important as economic rights.⁵³

⁴⁴ Trademark (Lanham) Act of 1946, 15 U.S.C. §§ 1051-1127 (1988). The act addresses "[f]alse designations of origin and false descriptions." 15 U.S.C. § 43(a), 15 U.S.C. § 1125.

⁴⁵ *Gilliam v. American Broad. Co.*, 538 F.2d 14, 24 (2d Cir. 1976).

⁴⁶ See *infra* notes 48-52 and accompanying text.

⁴⁷ Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use* 14 CARDOZO ARTS & ENT. L.J. 79, 99 (1996) [hereinafter Yonover].

⁴⁸ Desai, *supra* note 8, at 16.

⁴⁹ Swack, *supra* note 10, at 385 (citing *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331 (S.D.N.Y. 1968)).

⁵⁰ *Id.*

⁵¹ Ben Sisario, *Still Fighting for the Right to His Voice*, N.Y. TIMES, Jan. 20, 2006, at E3 [hereinafter Sisario].

⁵² *Id.* But see *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992) (finding that the remedy for a "sound-alike" suit exists because of "an *economic interest* akin to that of a trademark holder in controlling the commercial exploitation of his or her identity") (emphasis added).

⁵³ Sisario, *supra* note 51, at E3.

I now turn to the “fair use” doctrine, because even VARA, the only definitive moral rights legislation in the United States, is subject to the fair use statute of the Copyright Act.⁵⁴ The fair use defense states that non-owners of the copyrighted work may use the work in a reasonable manner without consent from the copyright owner.⁵⁵ Whether the court allows you to reproduce, distribute, adapt, display and/or perform copyrighted works depends on a number of factors.⁵⁶

It is argued that these factors are difficult to apply in a moral rights regime.⁵⁷ First, under the purpose and character factor, the term “transformative” directly conflicts with the moral right to prevent distortion, mutilation, or modification of the original, because an artist presumably believes that any modification devalues the original work.⁵⁸ Second, “nature” of the copyrighted work refers to an intangible work of authorship, rather than the tangible “work” created by the author.⁵⁹ The third factor, regarding “amount and substantiality,” is problematic because this calls for the subjective measurements of quality and quantity “used” by the defendant and the Court.⁶⁰ The final factor that affects the legality of the fair use is the “effect” of such reproduction on potential marketability;⁶¹ unfortunately, this factor fails to recognize that moral rights emphasize personal, rather than economic investments.⁶²

Section 107 of the Copyright Act lists a number of ways for a use to be considered “fair,” including criticism, comment, news reporting, teaching, scholarship, and research.⁶³ However, in music, fair use is principally witnessed in the case of a parody of a song, a concept that directly opposes the purpose of moral rights. An often cited case illustrating this point is *Campbell v. Acuff-Rose Music, Inc.*⁶⁴ This case involved the rap group 2 Live Crew’s rendition of Roy Orbison’s “Oh, Pretty Woman.” Campbell sought the permission of Acuff-Rose, the copyright owners, to use the song “Oh, Pretty Woman.”⁶⁵ Campbell told Acuff-Rose that the parody would credit the original authors and copyright owners, and that he was willing to pay reasonable royalties for the use of the original in the parody.⁶⁶ Nonetheless, Acuff-Rose, as representative of the original creator, was

⁵⁴ 17 U.S.C. § 107 (2006).

⁵⁵ Desai, *supra* note 8, at 17.

⁵⁶ See 17 U.S.C. § 107 (2006). These factors include: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” *Id.*

⁵⁷ Dane S. Ciolino, *Rethinking Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 81 (1997).

⁵⁸ *Id.* at 83-86.

⁵⁹ *Id.* at 86.

⁶⁰ *Id.* at 87.

⁶¹ *Id.* at 88.

⁶² *Id.* at 88-89.

⁶³ 17 U.S.C. § 107 (2005).

⁶⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁶⁵ *Id.* at 572.

⁶⁶ *Id.*

not interested in this proposal.⁶⁷ Campbell paid no attention to Acuff-Rose's objection and published the parody in the album "As Clean As They Wanna Be," still crediting the original authors.⁶⁸

In essence, 2 Live Crew's rendition was a form of piracy because the underlying work was used without permission, despite crediting the original author. The Supreme Court disagreed, holding that the parody lyrics were a fair use.⁶⁹ The Court reasoned that if "a work targets another for humorous or ironic effect, it is by definition a new creative work," despite the original author's objections.⁷⁰

This suggests that someone could claim fair use as a defense for abridging an artist's moral rights, "the special bond that exists between creator and creation."⁷¹ Therefore, without a fair use defense, an artist has a "greater chance of success in an infringement suit because of the deference afforded an artist's reputation and honor in a moral rights system."⁷²

On the other hand, the promotion of creativity is the crux of the Copyright Clause of the Constitution, whereby "Progress would be stifled if the author had a complete monopoly of everything."⁷³ Not only can criticism, critique and satire "Progress . . . Science," as dictated by the Constitution,⁷⁴ but often a piece based

⁶⁷ *Id.* at 572-73.

⁶⁸ *Id.* at 573.

⁶⁹ *Id.* at 594.

⁷⁰ *Id.* at 598-99 (Kennedy J., concurring).

⁷¹ Yonover, *supra* note 47, at 89.

⁷² Brandon G. Williams, Note, *James Brown v. In-Frin-Jr: How Moral Rights Can Steal the Groove*, 17 ARIZ. J. INT'L & COMP. L. 651, 660 (2000) [hereinafter *Williams*].

⁷³ Diego A. Ramos, "Oh, Pretty Woman," *Luke Took Your Beauty Away, May NAFTA Come to Your Rescue?* *Campbell v. Acuff-Rose, Can There Ever Be "Moral Rights" in the United States or Puerto Rico*, 29 REV. JUR. U.I.P.R. 173, 182 (1994). Ramos illustrates a number of cases, where the Court held that the public good surpasses an artist's or copyright owner's interests. See e.g. *Sony Corp. of Am. v. Universal City Studios, Inc.* 464 U.S. 417, 499-500 (1984) (holding that time-shifting allows people to copy copyrighted works for viewing at a later time); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (finding that copyright law inspires artistic creativity for the public good).

It is stated most eloquently in the patent case of *Graham v. John Deere Co.* that: "The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the standard expressed in the Constitution and it may not be ignored." *Graham*, 383 U.S. 1, 5-6 (1966).

⁷⁴ In Samuel Johnson's "A Dictionary of the English Language," the most authoritative dictionary in the latter part of the eighteenth century, the first definition for "science" was "knowledge." Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, n. 42 (2002). Also, knowledge reflected an important point in common for eight of the twelve state copyright statutes, which sought to enact intellectual property rights for the ultimate betterment of humankind. Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1809 (2006). President George Washington affirmed this focus in addressing the first Congress: "Knowledge is, in every country, the surest basis of public happiness." L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 947 (2003). This all shows that the

on another piece is *not* intended as an infringement but as a *new* work in and of itself. Furthermore, a number of other jurisdictions recognizing moral rights also accept some form of fair use: *i.e.* “fair dealing” in England; “free utilization” in Germany; and France’s exemption for “parodies, pastiches and caricatures.”⁷⁵

To rebut this, Professor Ginsburg of the Columbia Law School appeared before the House subcommittee considering VARA and said: “The original or few copies with which the artist was most in contact embody the artist’s ‘personality’ far more closely than subsequent mass produced images. . . .”⁷⁶ Thus, while fair use needs to remain intact to a certain degree, we must recognize that the artist’s integrity, reputation, and honor are all at stake in a pirated world. Artists and all the parties who contract with them must understand that *full* protection exists only if a moral rights clause becomes part of American copyright law, which is not presently so.

B. Artists Contract with the Pirates

The biggest problem an artist faces without moral rights protection is the artist contract. Currently, the industry norm is for an artist, as an original copyright owner, to relinquish all authority over his or her work to either the record company or the publishing house.⁷⁷ What makes this so common is the existence of essentially two copyrights that exist in a musical work—composition rights and performance rights; and therefore two potential economic streams to flow from such copyrights—mechanical royalties and performance royalties.⁷⁸ The problem is that the composition copyright is held by the writer or publisher, and the performance copyright, as a mechanical royalty, is held by the record

Framers did not intend to vest in Congress anything akin to the English royal grant in the creation and assignment of monopolistic privileges.

Accordingly, when Congress enacted the first national Copyright Act in 1790, the emphasis was on the utilitarian public interest model. The Act was entitled: “‘An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.’” If the property right rationale were controlling, a different title would have been expected. For example, titles such as ‘An Act for the protection of authors and proprietors of copies, to secure to them their property in maps, charts, and books’ or ‘An Act for securing property of authors and proprietors of copies in their maps, charts, and books’ would be more consistent with a property right rationale.” Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring Public Interest*, 44 SANTA CLARA L. REV. 365, 427-28 (2004). Similarly, the Supreme Court’s early rulings treated copyright as a statutory creation designed to serve the public benefit and only secondarily to reward authors. *See e.g.* *Wheaton v. Peters*, 33 U.S. 591 (1834) and *Baker v. Selden*, 101 U.S. 99, 105-06 (1879).

⁷⁵ Paul Nicholas Boylan, *Reconciling Artist’s Moral Rights with Economic Principles and the Problem of Parody: Some Modest Proposals*, 1 JOURNAL OF LAW AND COMMUNICATIONS (2005), available at http://www.uclan.ac.uk/facs/class/legalstu/JoLaw&Comms/2005_1/boylan-2.htm [hereinafter Boylan].

⁷⁶ Visual Artists’ Rights Act of 1989: Hearings on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary, H.R. REP. NO. 101-514, at 6922 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6922 (statement of Prof. Jane C. Ginsburg).

⁷⁷ Desai, *supra* note 8, at 18.

⁷⁸ *Id.* at 19-21.

company through the negotiated recording agreement.⁷⁹ Presently, unless the artist is also the composer, in no way is an artist's moral integrity protected. Such agreements leave an artist without much control over his or her music.⁸⁰ Not only do recording contracts require artists to record exclusively for one record company, but contracts also preclude artists from re-recording a selection for another record company.⁸¹ Consequently, many musicians "sign whatever agreement they get in order to ensure some recording deal."⁸² In most situations, artists (especially new artists) are forced to forfeit any moral rights they potentially have in order to make a living.⁸³

For example, "record companies have exclusive rights to reproduction, the preparation of derivate works, distribution, and public performance through digital audio transmission."⁸⁴ And, if record companies merge, a musician can find that his or her existing contract and music are no longer held to the original standard.⁸⁵ Thus, "musicians can easily lose control over their artistic vision based on custom in record contracts, without record companies even taking much risk."⁸⁶

Another hurdle a musician presently faces is the need to get music played. Under the current licensing scheme, any venue that has an American Society of Composers, Authors and Publishers (ASCAP) license, can play the song or use the song in any way they please.⁸⁷ Even if the artist disagrees with such use, the artist cannot prevent such use under existing licensing law.⁸⁸ But, what happens when "a song is played and used out of context," thereby "desecrat[ing] the song, musician, and listeners[?]"⁸⁹ Musicians should be entitled the right to protect against licensing schemes that violate authorship intent, and currently this is not an option.

There are three main types of licenses: mechanical, performance, and synchronization.⁹⁰ First, mechanical licenses permit reproduction in forms that use a mechanical device to play sound, such as records and compact discs.⁹¹ The musical copyright owner is given by law the first right to distribute the mechanical recordings, or the "mechanicals."⁹² Once distributed for the first time, anyone can make his or her own recording of the song and distribute it to the public.⁹³ The

⁷⁹ *Id.* at 19.

⁸⁰ *Id.*

⁸¹ *Id.* at 18.

⁸² *Id.*

⁸³ *Id.* at 18-21.

⁸⁴ *Id.* at 19. To note, although the record companies have such listed exclusive rights, the rights do not affect public performance and display rights outside of digital audio transmissions. *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 2.

⁸⁸ *Id.* at 2-3.

⁸⁹ *Id.* at 3.

⁹⁰ *Id.* at 4-5.

⁹¹ *Id.* at 5.

⁹² *Id.*

⁹³ *Id.* at 5.

main issue here is that the artist loses control over the future prospects of the work, relinquishing personal authority over his or her work and original intent.

Digital sampling and/or “cover songs” also have potential moral rights implications, despite courts focusing on economic implications through compulsory licenses.⁹⁴ If one looks at the case concerning Biz Markie’s unlicensed use of a sample from Raymond “Gilbert” O’Sullivan’s 1972 hit “Alone Again,” this holding “seems limited to instances where the composer is also the copyright owner, as it focuses on the copyright owner’s proprietary rights and not on the creator’s moral rights. As such, it has no direct bearing on the composer’s moral rights of attribution and integrity.”⁹⁵ Therefore, although the artist may invoke copyright law under an economic regime, a moral rights system ensures the ultimate protection of an artist’s creation when the artist no longer retains the copyright.

Second, performance licenses allow an entity to perform a musical work publicly. Performing Rights Societies, such as ASCAP, Broadcast Music, Inc. (BMI) and Sesac, Inc. police the use of musical works and distributes royalties based on these performances.⁹⁶ However, these Societies fail to protect use of musical works outside their original moral intention, particularly because more play means more money, regardless of when or where the song gets played.

For example, Bruce Springsteen’s song, “Born in the U.S.A.,” was written to tell the story of a Vietnam Veteran who comes home to an America “that seems to fail him in return.”⁹⁷ Once Springsteen released the song, he was enraged by people who invoked his song as a patriotic anthem. He refused to sell the licensing rights for a Chrysler commercial, an offer estimated to be worth twelve to sixteen million dollars.⁹⁸ Nevertheless, Performing Rights Societies declined to uphold his wishes, and used their authority to play the song to invoke patriotism, contrary to Springsteen’s intent.⁹⁹ Springsteen had no recourse under present law.

Additionally, many artists are subject to blanket licenses, which enable a person to pay an annual fee to play one or more titles in the society’s music catalogue.¹⁰⁰ These blanket licenses are too “broad” and potentially allow the licensee to infringe on an artist’s attribution and integrity rights.¹⁰¹ Ultimately, the current licensing laws do not give the artist authority over how and when his or her creation is manipulated, performed or distributed.¹⁰²

⁹⁴ *Id.*

⁹⁵ Zabatta, *supra* note 13, at 1126-27 (1992) (citing *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991) (holding that the artist Raymond “Gilbert” O’Sullivan owned a valid copyright, protected against the infringement by rap artist Biz Markie, who without obtaining the requisite license, incorporated three words from the copyrighted piece into his hip-hop recording).

⁹⁶ Desai, *supra* note 8, at 7.

⁹⁷ *Id.* at 2.

⁹⁸ *Id.*

⁹⁹ *Id.* at 2-3.

¹⁰⁰ *Id.* at 8.

¹⁰¹ *Id.*

¹⁰² *Id.*

The third type of licensing, synchronization, authorizes a musical work to be used in an audiovisual piece, such as a motion picture or television show.¹⁰³ In *Shostakovich v. 20th Century Fox*, a recognized Russian composer objected to the use of his music in an anti-communist film.¹⁰⁴ The court refused to enjoin the names or music because the music was in the public domain and no longer retained copyright protection.¹⁰⁵ However, the case was also litigated in France, where the French court found there was “undoubtedly a moral damage.”¹⁰⁶ If moral rights were recognized and enforced in the United States, the outcome would most likely follow the French rationale.¹⁰⁷

The above three licensing examples are usually in the form of a written contract. The problem with such contracts is that they are economic in nature and do not address *moral rights* considerations. ASCAP, BMI and Sesac need to exist because they are important regulators of these licenses, by “provid[ing] a valuable service of monitoring use of songs and providing economic returns.”¹⁰⁸ Ultimately, an artist should retain the right to retract such licenses from repeated use once the integrity of the work is violated, such as performed out of context or sampled inappropriately.

C. An Economic Paradigm Fails to Combat Piracy Problems

To combat piracy, the Recording Industry Association of America (“RIAA”), the Motion Picture Association of America (“MPAA”), and other entities within the music and movie industry first used an economic-based argument to successfully litigate against peer-to-peer companies in *A & M Records, Inc. v. Napster, Inc.*, and *In re Aimster Copyright Litigation*.¹⁰⁹ More recently, in cases such as *Metro-Golden-Mayer, Inc. v. Grokster, Ltd.*, peer-to-peer companies have successfully overturned the very legislation created to regulate them.¹¹⁰ Now, in a panic, the industry has attempted to sue individual file sharers, who use these companies for pirating, promising to do so until consumers “get the message.”¹¹¹

¹⁰³ *Id.* at 9.

¹⁰⁴ *Shostakovich v. 20th Century Fox*, 80 N.Y.S.2d 575, 577 (Sup. Ct. 1948), *aff’d*, 87 N.Y.S.2d 430 (N.Y. App. Div. 1949).

¹⁰⁵ *Id.*

¹⁰⁶ Ronald B. Standler, *Moral Rights of Authors in the U.S.A.* (1998), <http://www.rbs2.com/moral.htm>.

¹⁰⁷ Desai, *supra* note 8, at 8. See also Zabatta, *supra* note 13, at 1125.

¹⁰⁸ Desai, *supra* note 8, at 21-22.

¹⁰⁹ See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (holding that specific knowledge of direct infringement, coupled with a centralized indexing system, made Napster liable); *In re Aimster Copyright Litigation*, 334 F.3d 643, 653 (7th Cir. 2003) (finding that, “if the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses”).

¹¹⁰ See *MGM, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764 (2005) (holding that because Grokster did not use a centralized server like Napster and Aimster, Grokster did not have control and actual knowledge of infringement, thereby imposing no liability for contributory or vicarious infringement).

¹¹¹ See Lantagne, *supra* note 3, at 284. For example, “[a]mong the 261 lawsuits filed by the Recording Industry Association of America on September 8 [2004], the preteen set has figured

Unfortunately, these suits have been criticized as being “excessive,” “heavy-handed,” “horrible” and “counterproductive,” because not only do individual file-sharers have limited funds to defend litigation, but this is also a “public relations nightmare” for artists and the industry as a whole.¹¹² Furthermore, these court decisions do not significantly lower the number of people file-sharing.¹¹³ Although file-sharing activity immediately declined after these lawsuits ensued, file-sharing increased at a higher rate after a short period of time elapsed.¹¹⁴

The bottom line is that *economic-based* litigation and legislation are not solving the problems of piracy.¹¹⁵ I propose that a moral rights approach would drive a new incentive for illegal down-loaders to stop pirating. This incentive would first result in increased respect for artists, and in turn, justify profits for the recording industry as a whole.

IV. ADDRESSING THE SOLUTION

A. *Deficiencies in the Current Copyright Act*

1. *Expanding “Work of Visual Art” to Parallel Broader Terminology in the Copyright Act*

VARA is limited to a “work of visual art,” defined as “a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. . . ,”¹¹⁶ thereby excluding musical or audiovisual work.¹¹⁷ There are a number of potential problems with this limited definition.

First, the VARA definition directly conflicts with the subject matter

prominently, along with college students and (to the industry’s embarrassment) a teenaged recent immigrant from Poland, whose stash of online music turned out to include mostly recordings of Polish folks songs and Hungarian hip-hop – two genres of music not controlled by the five companies that ‘own’ [ninety] percent of the nation’s music.” *Id.*

¹¹² *Id.* at 284-85.

¹¹³ *Id.*

¹¹⁴ Maryann Jones Thompson, *Files Sharers Running Scared?*, CALIFORNIA LAWYER, Nov. 2005, at 12.

¹¹⁵ Copyright Laws, *supra* note 30. For example, there is the Federal Anti-Bootleg Statute, which prohibits the unauthorized recording, manufacture, distribution or trafficking in sound recordings or videos of artists’ live musical performances, and violators can be criminally punished with up to 5 years in prison and \$250,000 in fines. *Id.* There is also the Audio Home Recording Act of 1992 (AHRA), which allows consumers to make copies of copyrighted material for personal use; the Digital Performance Right in Sound Recordings Act of 1995 (DPRA), which allows copyright owners of sound recordings the right to authorize public performances of their works; and the Digital Millennium Copyright Act of 1996 (DMCA), which prohibits the manufacture and distribution of devices designed for the sole purpose of tampering with technology used to protect copyrighted works. *Id.* Though these are effective forms of regulation, they are mainly economic and still do not address the significant issue of an artist’s moral interests.

¹¹⁶ 17 U.S.C. § 101 (2006).

¹¹⁷ *Id.*

protected in the Copyright Act as a whole, which includes musical works, particularly any accompanying words, motion pictures and other audiovisual works, and sound recordings.¹¹⁸ Thus, I propose that in granting *moral rights* to the artist (as opposed to the economic copyrights which rest with the composer, publisher and record company), the Bill must apply to every form of music: from tangible media such as compact discs, vinyl albums, analogue cassette tapes; to modifications of these media into MP3s, singles, ring tones, master tones; to performances of this media such as concerts, music videos, appearances in television and motion pictures, and even video games. A bill covering every form of music will ultimately target the stronghold of recording, licensing and publishing agreements. It will ensure that artists are protected in every medium in which their work is likely released. For recording companies, publishing houses and licensing societies, this invariably means a new party, with an equally strong incentive, looking out for potential infringement.

Donald Passman would agree. In his discussion of creative control in *All You Need to Know About the Music Business*, he notes that in lieu of an author's moral rights for music or lyrics, artists must protect themselves by putting a moral rights concept in their songwriter or publisher contract.¹¹⁹

VARA also defines "work of visual art" to exclude "any work made for hire. . . ."¹²⁰ This involuntary exclusion "effectively makes freedom of speech alienable" by placing the economic interest in a work superior to the creative integrity and attribution right of the artist.¹²¹ In other words, for an entity to purchase copyrights or obtain them through work for hire conflicts with the artist's fundamental right to preserve personal expression.¹²² This directly refutes the purpose of moral rights, specifically because "the employee is really the instrumentality through which the employer's creativity is manifested."¹²³

One may argue that an artist, as an employee, specifically signs a contract understanding the nature of the job and that the employer becomes the author. However, since the nature of most employment is based on an economic paradigm, an employer's interest in the economic copyright should not also compel an artist to relinquish his or her moral rights under works made for hire, unless specifically negotiated otherwise.¹²⁴ Under a newly fashioned work for hire doctrine, the employer would maintain authority over the copyright while the artist would retain his or her moral right in the work.

¹¹⁸ 17 U.S.C. § 102(a) (2006).

¹¹⁹ DONALD PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 258 (5th ed. 2003) [hereinafter Passman].

¹²⁰ 17 U.S.C. § 101 (2006).

¹²¹ Joffrain, *supra* note 25, at 790.

¹²² *Id.*

¹²³ Zabatta, *supra* note 13, at 1134.

¹²⁴ *Id.*

2. *Broadening the Moral Rights Offered to Mirror European Counterparts*

VARA specifically grants the moral rights of attribution and integrity, the former being a right to be given credit, claim credit, and deny credit if a work is changed, and the latter being a right to ensure that the work is not changed without the artist's consent.¹²⁵ These rights must be recognized in the licensing and recording agreement schemes.

The exclusive right to create a "derivative work" under §106(2) of the Copyright Act may appear to parallel "modification" under the integrity or attribution moral right.¹²⁶ However, the right to create a derivative work rests with the owner of the copyright,¹²⁷ which in an economic model is not the creator but the recording company. When someone other than the artist owns both the original work and its copyright, any license granted to create a derivative work would directly negate an artist's moral right to prevent modification.¹²⁸

One may look to "cover songs" or "samples" under compulsory licenses and think that moral integrity protection exists for an artist. If someone "covers" a song, they cannot "change the basic melody or fundamental character of the work."¹²⁹ However, even a "cover song" has moral rights implications, depending on who the original publisher administers these rights to and on what conditions.¹³⁰ By adding a moral rights element to that license, an artist can ensure that the work does not fundamentally change, and that the right to authorize derivative works complements the integrity right.

This would also apply in the case of "fair use." While criticism, comment, news reporting, and research are justifiable ends for the use of an artist's work, a parody should be subject to moral rights approval by the author. For example, while some artists might see potential profit by a fair use, others may not, as seen in the *2 Live Crew* case.¹³¹ The decision should rest with the artist, and then the

¹²⁵ 17 U.S.C. § 106A(a) (2006). The former allows an artist to "claim authorship of that work;" "prevent the use of his or her name as the author of any work... which he or she did not create;" and "prevent the use of his or her name as the author of the work... in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation..." The latter right serves against "any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation" *Id.*

¹²⁶ See § 106(2). Under the Copyright Act, the owner of the copyright has the exclusive right to create a derivative work, defined as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted." § 101.

¹²⁷ § 101(2).

¹²⁸ Symposium, Peter H. Karlen, *What's Wrong with VARA: A Critique of Federal Moral Rights*, 15 HASTINGS COMM. & ENT. L.J. 905, 913 (1993) [hereinafter *Karlen*].

¹²⁹ Desai, *supra* note 8, at 5 (citing 17 U.S.C. § 115 (a)(2) (1994)).

¹³⁰ See Passman, *supra* note 119, at 270-272.

¹³¹ Another great example involves Danger Mouse's, *The Grey Album*, which mashed together the Beatles' *White Album* with Jay-Z's *The Black Album*. While Jay-Z enjoyed the publicity and encouraged the use, EMI, who claimed to control the Beatles' copyright, objected to such use. See generally, *The Grey Album by Danger Mouse*, BANNEDMUSIC.ORG, available at http://www.bannedmusic.org/albums/grey_album.php (last visited April 22, 2006).

copyright owner once the author(s) passes away, so long as the copyright exists.¹³² Instead of finding an inherent conflict and discrepancy between the Copyright Act and moral rights legislation, these two legal models should work to complement each other.

France, the world leader of moral rights legislation, agrees with this rationale.¹³³ The most famous French case involving the right of integrity involved painter Bernard Buffet, who “created a painting on the panels of a refrigerator.”¹³⁴ The refrigerator owner, who recognized the economic value of each panel, decided to deconstruct the refrigerator and sell each panel as an individual work of art.¹³⁵ This example is similar to a digital sampling artist using one piece of a song and selling the sample as a new work.¹³⁶ Buffet filed suit, claiming that his work was an “indivisible artistic unit.”¹³⁷ The Court recognized that modification to the work compromised its artistic integrity, and despite the copyright owner’s economic interest, the moral rights of the author were upheld.¹³⁸

Like the *Buffet* case, a music recording company, as the new copyright owner, could find it more profitable to sell songs as singles rather than as one complete album. But, what if the artist had an artistic vision that the entire album was “an experience” and needed to be listened as a whole? Or, take the example of Bruce Springsteen, where licensing companies licensed “Born in the U.S.A.” for patriotic gatherings contrary to Springsteen’s intended message.¹³⁹ The need for integrity and attribution rights should remain with the artist, despite any signed licensing or recording agreements.

Also, the law should be expanded to include two additional rights recognized under French law. These two rights are: the right to divulge, otherwise termed the right to publication, and the right to retract.¹⁴⁰ A principal case regarding divulgation involved the artist James McNeil Whistler and his painting “Whistler’s Mother.”¹⁴¹ In that case, Lord Eden sued Whistler over the painting of Lady Eden.¹⁴² Although Whistler arguably completed the work in question, he refused to divulge the work.¹⁴³ Although the Court required Whistler to refund Lord Eden, the Court held that Whistler had the inherent right as creator to decide when the work was complete, and therefore the buyer could not force the artist to relinquish

¹³² See *supra* notes 103-108 and accompanying text (discussing transfer, waiver, and term provisions).

¹³³ See Swack, *supra* note 10, at 404.

¹³⁴ Swack, *supra* note 10, at 397 (citing Judgment of 30 mai (*Buffet c. Fersing*), Cour d’appel Paris, 1962 Recueil Dalloz [D. Jur.] 570, *aff’d*, Cass. civ., 1965 Gazette du Palais [G.P.] II. 126).

¹³⁵ *Id.* (citations omitted).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Supra* at 97-99.

¹⁴⁰ See Williams, *supra* note 72, at 657; see also Swack, *supra* note 10, at 365-66.

¹⁴¹ See *Id.* at 658.

¹⁴² *Id.*

¹⁴³ *Id.*

his work.¹⁴⁴

The same reasoning from the *Whistler* case should apply to the music industry. For example, a record company may contract with an artist to complete a certain number of albums, but the artist does not like one of the albums, despite the record company insisting on the release due to contractual provisions agreed upon by both parties. The moral right of divulgation would give the artist the right to decide when the work is ready for distribution, although the artist must then agree to refund or partially refund the record company, as in *Whistler*, to respect the economic interest at stake.

American copyright law should also include the right of retraction, a right existing in France since the eighteenth century, which allows an artist “to alter or withdraw a work already in distribution.”¹⁴⁵ This is “presumably exercised when a work no longer reflects its creator’s beliefs and personality,” which are directly tied to the work of authorship.¹⁴⁶ For example, in the event that the work is transferred into another medium, such as a motion picture or ring tone, if this new media conflicts with original intent, then the artist should have the right to retract. As with the publication right, this right would also be subject to contractual compensation provisions, subject to parameters like sale minimums or length of the contract.¹⁴⁷

3. *Re-Writing Transfer and Waiver Provisions*

VARA currently states that moral rights may not be transferred, but those rights “may be waived if the author expressly agrees to” do so.¹⁴⁸ In terms of transfer provisions, “the reality of the marketplace means that authors *do* place an economic value on their work, and inalienable moral rights could be viewed as a limitation on the constitutional concept of liberty with respect to an artist’s freedom to make a contract.”¹⁴⁹ A creator’s refusal to hand over these rights, despite the threat of liability or loss of employment, provides evidence that there is more than a mere economic value to these rights.¹⁵⁰ The main problem with a no transfer provision occurs when an author passes away, but the copyright subsists. Therefore, to ensure that the moral integrity of a work is upheld so long as the work remains protectable by copyright, the inclusion of transferable moral rights must be an option for the artist.

There are also several potential issues with the VARA waiver provisions. If there are joint authors, VARA currently states that waiver can be exercised by one

¹⁴⁴ See Joffrain, *supra* note 25, at 766.

¹⁴⁵ Swack, *supra* note 10, at 379.

¹⁴⁶ Joffrain, *supra* note 25, at 767. The right of retraction is entirely discretionary, and courts do not question an artist’s reasoning for exercising such. The only requirement is indemnification, which makes just sense.

¹⁴⁷ Williams, *supra* note 72, at 657.

¹⁴⁸ 17 U.S.C. § 106A(e)(1)-(2) (2006).

¹⁴⁹ Zabatta, *supra* note 13, at 1131-32.

¹⁵⁰ Joffrain, *supra* note 25, at 780.

author on behalf of all joint authors.¹⁵¹ This provision is particularly problematic for musicians, whose work is often based on joint authorship. If waiver is exercised by one minor artist on behalf of the others, this could be disastrous for the principal artists.¹⁵² For example, in *Seshadri v. Kasarian*,¹⁵³ the Court noted that in such a case where the joint work,

is marred by errors reflecting unfavorably on his coauthor, with quantifiable adverse effects on the coauthor's career, the coauthor might conceivably have some legal remedy, but it wouldn't be under Copyright Act. We don't know what it would be under: possibly the law of contracts; in Europe it might be a violation of the author's 'moral right' (*droit moral*), the right to the integrity of his work.

This statement goes a long way to prove that a remedy should be implemented to appease all moral interests at stake.

Another problem with a waiver provision is that it subjects artists to unequal bargaining power, whereby artists are invariably forced to sell moral rights to contract with a recording or publishing house. Such waiver provisions highlight the economic interests that guide United States copyright law.¹⁵⁴ Nevertheless, waiver provisions are important for an artist who needs the money. Ultimately, it should be the choice of the artist (or artists in the case of joint authorship) to agree to any waiver.

4. *Lengthening the Term*

The Sonny Bono Copyright Term Extension Act extended United States copyright law to life of the author plus 70 years.¹⁵⁵ However, VARA is simply limited to life of the artist. Although moral rights are specifically intended for the artist, the copyright holder may be aware of the integrity of the work at stake. Under Berne Convention standards, moral rights last as long as economic rights.¹⁵⁶ Therefore, I advise that the same term provisions should apply within American moral rights legislation, provided that the moral rights are transferred by the author(s).

¹⁵¹ 17 U.S.C. § 106A(e)(1) (2006).

¹⁵² Karlen, *supra* note 128, at 922.

¹⁵³ *Seshadri v. Kasarian*, 130 F.3d 798, 803 (7th Cir. 1997). In this case, a University professor sued a former graduate student for copyright infringement, when the student attempted to assign copyright under his name alone. The student countered, noting that the work was jointly prepared and therefore, an "author of a joint work is a joint owner entitled to copyright it and license the copyright to a third party, subject only to a duty to account to his coauthor for any profits." *Id.* at 801. The Court agreed with the student that the work was jointly authored, despite the professor's argument that he substantially rewrote the student's draft language and refused to authorize joint acknowledgement when the student sought publication.

¹⁵⁴ Boylan, *supra* note 75. See also Zabatta, *supra* note 13, at 1131-1133 (discussing possible methods to reduce the disparity in bargaining power).

¹⁵⁵ See 17 U.S.C. § 302, Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, Title I, § 102(b), 112 Stat. 2827 (1998).

¹⁵⁶ Berne Convention, *supra* note 28, art. 6bis.

5. *Draft Language: "THE MORAL RIGHTS ACT OF 2007"*

§ 101 Definitions

- (a) In general – Chapter 1 of title 17, United States Code, is amended by adding the following definitions in section 101:

A “moral right owner,” with respect to any one of the moral rights comprised in a copyright, refers to the creator of that particular right, and independent of the owner of the copyright.

§ 106 Exclusive rights in copyrighted works, subject to moral rights approval

- (a) In general – Chapter 1 of title 17, United States Code, is amended by adding at the beginning of section 106 the following sentence:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights, subject to *moral rights* approval, to do any of the following:

§106A Subject matter of moral rights

- (a) Title – This Amendment will now be called the “Moral Rights Act of 2006”
- (b) In general – Chapter 1 of title 17, United States Code, is amended by adding at the beginning of section 106A the following section:
- (1) *Moral rights* protection subsists, in accordance with § 102(a) of the Copyright Act, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
 - a. Literary works;
 - b. Musical works, including any accompanying words;
 - c. Dramatic works, including any accompanying music;
 - d. Pantomimes and choreographic works;
 - e. Pictorial, graphic, and sculptural works;
 - f. Motion pictures and other audiovisual works;
 - g. Sound recordings; and
 - h. Architectural works
 - (2) In no case does *moral rights* protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, or principle.
 - (3) Any section within 106A will replace “work of visual art” with “work of authorship.”
- (c) Chapter 1 of title 17, United States Code, is amended by adding to subsection (a) of section 106A, the following: Rights of attribution, integrity, divulgation and retraction –
- (1) Shall have the right –
 - a. To claim authorship of that work,

- b. To prevent the use of his or her name as the author of any work of authorship which he or she did not create,
 - c. To prevent publication if the author is not satisfied with any work of authorship, and
 - d. To renounce a work and withdraw it from sale or display.
- (d) Chapter 1 of title 17, United States Code, is amended by replacing subsection (d) of section 106A with, the following:
 - (1) Duration of rights –
 - a. With respect to works of authorship, the rights shall endure for a term consisting of the life of the author, unless specifically transferred in who or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate cessation.
 - b. The term shall not exceed the expiry of the copyright of the work, subject to Chapter 3 of title 17, United States Code, section 302.
- (e) Chapter 1 of title 17, United States Code, is amended by replacing subsection (e) of section 106A with, the following:
 - (1) Transfer – Transfer provisions are subject to Chapter 2 of title 17, United States Code, section 201A.
 - (2) Waiver –
 - a. *Moral rights* may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified.
 - b. In the case of a joint work, waiver must be consensual to each author of the work.
 - c. There shall be no blanket waivers encompassing transferability of *moral rights*.
- (f) Chapter 1 of title 17, United States Code, is amended by adding subsection (f) of section 106A with, the following: Remedies for moral rights infringement –
 - (1) Remedies include –
 - a. Injunction,
 - b. Damages limited to actual damages or unjust enrichment, excluding any right to punitive damages, as consistent with the notion that these rights are personal and not pecuniary in nature
 - c. Further damages sought are appealable.
 - (2) In the case of divulgation or retraction, the *moral rights* owner may be subject to refund or partially refund the copyright owner for any express agreement not fulfilled, in due part to the exercise of the *moral rights*.

§ 107 Limitations on exclusive and *moral rights*: Fair use

- (a) In general – Chapter 1 of title 17, United States Code, is amended by adding at the beginning of section 107 the following sentence:
 - (1) Fair Use is appropriate for –
 - a. Criticism, Comment, News Reporting, Teaching, Scholarship, and Research.
 - b. Parodies are strictly subject to *moral rights* approval by the author(s).

§ 115 Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

- (a) In general – Chapter 1 of title 17, United States Code, is amended by changing section 115(b)(1) and adding section (b)(1)(a) as follows: Notice of Intention to Obtain Compulsory License –
 - (1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner and *moral rights* owner.
 - (2) There shall be no blanket licenses.
- (b) In general – Chapter 1 of title 17, United States Code, is amended by adding to section 115(c)(1) the following sentence: Royalty Payable under Compulsory License –
 - (1) The *moral rights* owner is not entitled to royalties for phonorecords made and distributed after being so identified, nor entitled to recover for any phonorecords previously made and distributed, unless expressly agreed in a written instrument signed by the parties otherwise.

§ 201A. Ownership of moral rights

- (a) In general – Chapter 2 of title 17, United States Code, is amended by adding the following section after section 201: Ownership of moral rights–
 - (1) Author Ownership – *Moral rights* in a work protected under this title vests only in the author of the work. The authors of a joint work are coowners of *moral rights* in the work.
 - (2) Works Made for Hire – In the case of a work made for hire, the employer or other person for whom the work was prepared is not considered the author for purposes of this title, unless the parties have expressly agreed in a written instrument signed by them otherwise that the *moral right* owner expressly assigns the *moral rights* to the employer or person for whom the work was prepared.
 - (3) Transfer of Ownership –
 - a. The ownership of a *moral right* may be transferred in who or in part by any means of conveyance or by operation of law, and may be bequeathed by will or

- pass as personal property by the applicable laws of intestate cessation.
- b. In the case of a joint work, transfer must be subject to express transfer, consensual to each author of the work.

V. BILL OPPOSITION

A. *The Recording Companies and Publishing Houses*

The most influential group that will oppose the Moral Rights Act of 2007 will be the recording companies and publishing houses, who currently have the most control over an artist's music with regards to the composition rights, performance rights and licensing rights—all customarily signed away in the recording or publishing agreement. Nevertheless, these entities should not fear the introduction of broad moral rights legislation. Once moral rights are recognized in this era of digitization, such regulation could help generate more money and fair recognition for artists and creators in the industry as a whole by potentially elevating the moral awareness of the pirating public.

“The notion of the greedy record company improperly exploiting artists may not be too far from the truth.”¹⁵⁷ This greed could be a main source of opposition to moral rights legislation for musicians, but it may also be the ultimate justification. The record industry will argue that after the widespread use of free music download and file-share sites such as Napster, and successor companies like Kazaa and Morpheus, the RIAA attacked the legality of peer-to-peer networks by appealing to the moral values of consumers downloading music.¹⁵⁸ The record industry attempted to use guilt, as well as the potential for legal sanctions, to deter copyright infringement. “The RIAA has argued that downloading an MP3 is the equivalent of stealing a CD from a record store. . . .”¹⁵⁹ Nevertheless, “[a]ccording to a 2003 Gallup poll, a staggering eighty-three percent of thirteen to seventeen-year-olds think that file-sharing is morally acceptable.”¹⁶⁰ A big reason for this sentiment is that individuals believe compact disc prices are too high.¹⁶¹ When one looks at the configuration of the music industry, the consumer sees the record company controlling the rights and pocketing most of the money, leaving artists in an un-recouped world.¹⁶²

While it is “hard for many Americans to feel guilty about ‘stealing’ music by downloading free MP3s when they consider the recording industry to have been

¹⁵⁷ Desai, *supra* note 8, at 19.

¹⁵⁸ Lantagne, *supra* note 3, at 270.

¹⁵⁹ *Id.* at 277-78.

¹⁶⁰ *Id.* at 278.

¹⁶¹ *Id.* at 279.

¹⁶² See *supra* notes 81-83 and accompanying text (discussing the file-sharing cycle, whereby immediately after suits are filed, there is a decrease in file-sharing, followed by a subsequent increase in file-sharing once suits are settled).

stealing from its artists for decades,”¹⁶³ moral protection for artists could appeal to a new value within the up-loader’s and down-loader’s consciousness. This value respects the longevity of moral intentions as well as the economic life to which a work is presently entitled. Instead of lawsuits against individuals based on economic incentives for industry moguls, the music industry should focus on the moral interests of the artist. An expansive education campaign to inform the public about moral rights, and what this means *for artists*, could appeal to the purchasing power of consumers. With this new value woven into social consciousness, the consumer would feel guilty for stealing from the “struggling” artist, rather than the record industry or publishing house conglomerates. This, in turn, would lessen illegal uploading, downloading, and file-sharing. Not only would the artist’s interests be protected, but the record companies would also see an economic windfall from the increase in purchased music.

B. *Illegal Down-Loaders*

Another group to oppose the Bill would be the millions of Americans who benefit from expansive libraries of illegally downloaded music. The success of peer-to-peer file-sharing is in large part due to the fact that such networks “give users more control over the entertainment they consume.”¹⁶⁴ Moreover, file-sharing, CD burning and even hard-drive swapping are easy to do.

The truth is Americans and the public-at-large presently do not have the incentive to stop illegal uploading, downloading, and file-sharing. If we appealed to the public’s *moral values*, there may be the potential for a major shift in the public’s perspective with increased respect for the artist. The solution would be for artists to speak publicly about moral integrity, emphasize what it means to them personally, and how illegal downloads affect their ability to make a living. Artists could utilize campaign techniques similar to those used in sex education, voter participation, or environmental initiatives. Within this framework, an artist can tell the public that he or she will refuse to divulge, or even retract a song, if illegal copyright infringement continues.¹⁶⁵

The apparent counter-argument is: why would any artist do this? More illegally downloaded music means more people listening to an artist’s music, which translates into more merchandise and concert sales—the primary way artists make money in today’s market environment.¹⁶⁶ At first, this might seem like a great sacrifice for an artist. In the long run, moral rights become an extremely valuable concept for artists both economically and creatively. Since the public wants artists to create, artists ultimately hold the bargaining chip. When the future potential and excitement of creativity is jeopardized by negatively affecting the

¹⁶³ Lantagne, *supra* note 3 at 280.

¹⁶⁴ *Id.* at 274.

¹⁶⁵ See *supra* note 143-47 and accompanying text (regarding the need for a divulgation and retraction right).

¹⁶⁶ Tom Zeller, Jr., *Pew File-Sharing Survey Gives a Voice to Artists*, NYTIMES.COM, Dec. 6, 2004, http://www.nytimes.com/2004/12/06/arts/06down.html?_r=1&adxnnl=1&oref=slogin&adxnnlx=1190240405-aX1OfeWpT7nr4pR7Ff7F3Q.

integrity of a work, the public might think twice before it downloads illegal files.

C. *Digital Sampling and Mashing Artists*

Another group to possibly oppose the Bill would be artists who engage in digital sampling, a common trend found in electronic and hip-hop music. As Passman says, “[u]nless you’ve been living in a cave for the last few years, you know that every rapper on the planet samples freely from other people’s works.”¹⁶⁷ This technique, also referred to as “appropriationism,” allows an artist to incorporate previously copyrighted work into a new work.¹⁶⁸ Currently, there are a number of licensing schemes in place before a digital sampling or mashing artist can theoretically release an album with samples. In fact, “[r]ecord companies won’t release a recording containing samples without assurances that the samples have been cleared” by both the record company owning the sampled recording and the publisher of the sampled musical composition.¹⁶⁹

But what about clearing the samples with the artist, the true creator? If a sampling or mashing artist misappropriates another artist’s original creation, then there are largely pecuniary remedies to make the original artist seemingly whole again. If such sampling offends an artist’s *moral rights*, then under moral rights legislation, the artist would have authority to say that he or she does not want his or her work attributed to the sample. The artist would have the right to retract that sample. Just as digital sampling artists must succumb to compulsory licensing schemes, such samplers should also come to understand a release on a license might offend an artist’s moral rights.¹⁷⁰ This is not much more an extension of rights clearance than presently exists.

VI. CONCLUSION

The most apparent reason to explain why moral rights have been excluded from United States Copyright Law is that there is a fear that the existence of personal rights for artists would negatively impair the social goals, and invariably the economic framework, of copyright law in Article I, Section 8, Clause 8 of the United States Constitution. On a social level, *can you imagine every artist in America claiming moral integrity, attribution, publication and retraction rights to works of authorship?* The enforcement of an artist’s creative rights would seemingly result in increased litigation, greater expense to the public, and limit widespread dissemination of information.¹⁷¹

Ultimately, the long experience of many nations indicates that recognizing moral

¹⁶⁷ Passman, *supra* note 119, at 306.

¹⁶⁸ Williams, *supra* note 46, at 653. Digital sampling is a popular mode of expression for modern artists and musicians. These artists argue that instead of being a “banal and uncreative reproduction of an original work of authorship. . . . the replication of an original work by another artist is a novel form of artistic criticism, a post-modern artistic approach referred to as ‘pastiche.’” *Id.*

¹⁶⁹ Passman, *supra* note 119, at 307.

¹⁷⁰ See Desai, *supra* note 8, at 21-22.

¹⁷¹ See Joffrain, *supra* note 25, at 776.

rights and restricting their alienability is not obviously lethal to such goals as equitable remuneration or public dissemination. The issue then seems not whether moral rights and economic rights can cohabit, but how some combination can be most beneficial to society.¹⁷²

In my view, the combination of moral and economic rights benefits society when the creator, who has a personal stake and familiarity with the work, takes responsibility and holds ultimate moral title to his or her creations. Proper attribution helps the public recognize a work's authenticity. Retraction may solve concerns associated with technology, where information is widely disseminated against an artist's wishes. Integrity allows an artist to control future uses of his works, such as a parody or sample, which are currently at the disposal of the record company or publishing house. Finally, a publication right may inspire an artist to create a greater number of works, and because of a heightened interest in those works, there may be an impetus to improve personal standards, and thereby enhance artistic quality overall.¹⁷³

We all know the problem: music piracy is rampant. A kid illegally downloading music in his or her college dorm is just as culpable as a pirate with a peg-leg storming a ship on the high seas for booty. Piracy is the impetus for us to promote the importance of moral rights. Once the public becomes informed that such rights exist, recording companies will be justly compensated, legal download quality will increase for consumers, and artists will finally receive the protection they deserve. Thus, despite a threat of increased litigation or a periodic decline in dissemination, moral rights must be considered and enacted into the United States Copyright Act.

Moral rights legislation will work because it has been tried and tested. These rights have existed in Europe for centuries, with great success and little disruption to the copyright system and the profitability of the recording industry, including the economic and creative well-being of artists. Congress has already implemented VARA, and now needs to take moral rights protection one step further to protect the music industry.

¹⁷² *Id.* at 777.

¹⁷³ "To put it negatively: a distributed work which is not an accurate reflection of an author's skill discourages learned people from composing—or at least from getting an advance for—future works." Mike Holderness, *Moral Rights and Authors' Rights: The Key to the Information Age*, JOURNAL OF INFORMATION, LAW AND TECHNOLOGY 4 (1998), <http://www.poptel.org.uk/nuj/mike/jilt-mr.htm>.